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entry by writ of assistance was unlawful. The real ground of the decision seems to have been the subsequent acquiescence of the assignee. Under what circumstances a mortgagee may acquire lawful possession by inducing the mortgagor's tenant to attorn is still in doubt. It is provided in 1 R. S., Ch. 744, § 3, Laws of 1896, Ch. 547, § 194, that attornment after forfeiture shall not be void. A literal construction would lead to the anomalous result that, if by chance there be a tenant in possession, a mortgagee may acquire lawful possession without consent, whereas under any other circumstances consent is essential. The courts may, in view of the change in the nature of the mortgagee's estate since the original enactment of the statute, construe "after forfeiture" to mean "after foreclosure," or in any event require the mortgagor's consent.

Logically, also, a mortgagee in possession in one character may not without the mortgagor's consent assert possession as mortgagee. The first case arising after the triumph of the mortgagor's estate in *Trim v. Marsh*, *supra*, was, however, a hard case where the equities were all with the mortgagee who had entered under a void contract of purchase. The court, refusing to eject the mortgagee, asserted that the mortgagee's possession was lawful though not given under the mortgage or with a view thereto. *Madison Ave. Bapt. Church v. Oliver Bapt. Church*, *supra*. A recent case, *Barson v. Mulligan* (N. Y. 1908) 84 N. E. 75, carefully limits the application of this decision. It was held that the lessee of a tenant for life was not entitled to retain possession by virtue of an overdue mortgage purchased before, or shortly after, the death of her lessor. The court affirmed *Howell v. Leavitt*, *supra*, and laid down the rule that a mortgagee in possession as tenant, may not change the character of his possession to that of mortgagee without the mortgagor's consent. Express repudiation of *Winslow v. McCall*, *supra*, was avoided by treating the conclusion of law, i. e., the legality of the possession, as a finding of fact. The distinction between the principal case and *Madison Ave. Bapt. Church v. Oliver Bapt. Church*, *supra*, is narrow and seems to consist merely in that one in possession under a void deed occupies an ambiguous, ill-defined position, not regarded as inconsistent with possession under the mortgage, whereas the relation of tenant and landlord is well settled in character, and possession under the mortgage is clearly inconsistent therewith. Whether *Madison Ave. Bapt. Church v. Oliver Bapt. Church*, *supra*, will be restricted to its facts, is uncertain, but desirable; for a mortgagee is sufficiently protected in equity. The decision in the principal case is a real step in advance in that it defines more accurately the right of a mortgagee to retain possession once lawfully acquired. If he enter as tenant, express trustee, or, perhaps, as vendee under a contract of sale, the mortgagor's consent is essential.

THE RELATION OF BROKER AND CUSTOMER IN MARGIN TRANSACTIONS.—Agitation concerning transactions on margin makes a recent decision of the Supreme Court especially timely. Securities were bought for a speculator on "margin," under an agreement permitting the broker to pledge the securities carried in his general loans. Within four months of proceedings in bankruptcy against the broker, the securities were redeemed

by the broker and delivered to the customer, on receipt of the balance of account. The trustee in bankruptcy sued the customer, alleging a preference. A verdict was directed for the defendant on the ground that, since no relationship of debtor and creditor existed, the transfer was not preferential. *Richardson v. Shaw* (U. S. 1908) 28 Sup. Ct. Rep. 512. Following a leading New York case, *Markham v. Jaudon* (1869) 41 N. Y. 235, most jurisdictions regard stocks purchased on "margin" as the customer's property *ab initio*. *Baker v. Drake* (1876) 66 N. Y. 518; *Brewster v. Van Liew* (1886) 119 Ill. 554. The broker, according to their analysis, is the customer's agent in making the purchase; becomes his creditor for the amount advanced; is a pledgee of the stock to secure repayment of advances; is bound to have in his name or under his control, ready for delivery, the identical or similar shares; finally, upon receipt of all advances and commissions accruing, must comply with the customer's demand for delivery or for sale on account. The client must keep good a stipulated "margin," and stand prepared to take over the stock at the purchase price when required.

Upon analysis, the logical and practical difficulties of this position, strongly insisted upon by the Massachusetts courts, *infra*, and their adherents, 15 Harv. L. R. 78, are not serious. First, omission of delivery and redelivery is immaterial. The law seeks substance, not form. *Skiff v. Stoddard* (1893) 63 Conn. 198, 217. Moreover, it is well recognized that where a pledgee has the *res* already in his possession, the contract of pledge *per se* operates as a delivery. Story, *Bailments* (9th Ed.) 266. Second, as early as Kent's day, *Nourse v. Prime* (1820) 4 Johns. Ch. 490, it was decided in the case of a simple pledge that, provided the broker holds sufficient shares of similar stock, the identical shares of each customer need not be kept separate or even retained. The Massachusetts Supreme Court, on the other hand, speaking through Holmes, C. J., regards the "extreme tenuity of connection with any specific object" as an insurmountable obstacle to the existence of a pledge. *Chase v. City of Boston* (1902) 180 Mass. 458. Yet, in the well-known "Grain Elevator" cases, the confusion of the depositor's grain with other grain of like quality is regarded as perfectly compatible with a contract of bailment. Cf. *Chase v. Washburn* (1853) 1 Oh. St. 244. The case of *Levy v. Loeb* (1881) 85 N. Y. 365, far from conflicting, harmonizes perfectly, with the New York theory, for the contract specifically provided that the identical original securities be carried. The court expressly recognized that ordinarily a return of similar stock is adequate, provided—and this is fundamental—the broker at all times keeps under his control sufficient to satisfy the claims of his customers; the mere possession of ample funds with which to make good a stock shortage is insufficient. *Douglas v. Carpenter* (1897) 17 App. Div. 329. Third, the custom of brokers to rehypothecate stock-carried is not a real inconsistency. There is ordinarily no implication that a pledgee shall retain the pledge in his exclusive possession. Jones, *Pledges* (2nd Ed.) 452. Doubtless in exceptional instances, e. g., an artistic masterpiece, such obligation of personal care may arise, but this element is absent in the case of stock certificates. A limitation is that the

repledge shall not be for an amount exceeding the indebtedness of the customer to the broker, since such disposition would operate to deprive the customer of immediate possession upon tender of the sum of his indebtedness. *Douglas v. Carpenter*, *supra*. Fourth, it is insisted that as stocks are a fluctuating property, the burden should not be upon the broker to call for more "margin," and to give reasonable notice of the time and place of sale. In most jurisdictions, however, and certainly on principle, evidence of a trade custom to sell without notice on exhaustion of "margin" is admissible. 6 COLUMBIA LAW REVIEW 365. Even in New York, where it is inadmissible, *Markham v. Jaudon*, *supra*, the broker may protect himself by special agreement with his customer. *Dos Passos, Stock-Brokers*, 114; *Baker v. Drake*, *supra*.

In contrast with this theory, the Massachusetts courts regard the broker as the owner of the shares upon a conditional executory contract to deliver them to the customer on demand and proper tender. *Wood v. Hayes* (1860) 15 Gray 375; *Corell v. Loud* (1883) 135 Mass. 41; *Weston v. Jordan* (1897) 168 Mass. 401. A like view of the similar "contango" transaction appears to have been taken in England by a lower court. *Bentinck v. London etc. Bank* [1893] 2 Ch. 120, esp. 140. Apart from the fact that if this construction were adopted it would become very questionable whether all "margin" transactions could not be set aside as mere wagers, *Dos Passos, Stock-Brokers*, 115, it is submitted that only by a perverted construction of the understanding of the parties, can the broker be regarded as the owner of the stock. The risk of the venture is the customer's solely. The dividends accruing are his. He pays interest upon the broker's advances. Any enhancement in value belongs to him. The broker is interested only to the extent of his commission. From every logical standpoint, therefore, the rejection of the Massachusetts view by the Supreme Court appears fortunate.

CONDITIONAL LIMITATIONS AFTER FAILURE OF PRIOR GIFT.—If a gift over be limited upon the performance of a condition, the gift cannot take effect unless the condition has been performed, though the first devisee die in the testator's lifetime. *Doo v. Brabant* (1792) 4 T. R. 706. Thus, if there be a devise to A, and if he die under twenty-one to B, and A die over twenty-one in the lifetime of the testator, there is a lapse. *Carpenter v. Heard* (1833) 14 Pick. 449. Since the ulterior disposition in such a case could not vest if the first devisee survived the testator, clearly it could not, if he predeceased him. *Savage v. Burnham* (1858) 17 N. Y. 561. On the other hand, if the condition has been performed, though in the testator's lifetime, the gift over takes effect. *Willing v. Baine* (1731) 3 P. W. 113. Difficulties in the application of these rules arose in a series of cases beginning with *Jones v. Westcombe* (1711) Pre. Ch. 316. In that case there was a bequest to a child with whom the testator's wife was *enceinte*, and, if such child die under twenty-one, gift over to B. The wife proved not to have been *enceinte*, but the court held, without assigning a reason, that the bequest over took effect. In *Gulliver v. Wickett* (1745) 1 Wils. 105, construing the same will, it was said that "whether the limitation to the